(1)

Supreme Court, U.S.
FILED

991684 APR 18 2000

OFFICE OF THE CLERK

No. 99-

In the

Supreme Court of the United States

RANDALL A. CHARLES,

Petitioner,

v.

RICHARD STEHLIK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

MELAINE SHANNON ROTHEY
Counsel of Record
RAPHAEL, RAMSDEN & BEHERS, P.C.
1200 FRICK BLDG
437 GRANT ST
PITTSBURGH, PENNSYLVANIA 15219
(412) 355-4726

Curry & Taylor 202-393-4141/Washington D.C. 20005

57pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE RIGHTS TO CONCEIVE AND RAISE ONE'S CHILDREN HAVE BEEN DEEMED ESSENTIAL BASIC RIGHTS OF MAN EMBODIED IN THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; AND THUS, THE SUPREME COURT OF PENNSYLVANIA ERRED IN AWARDING PRIMARY PHYSICAL CUSTODY OF THE CHILD TO THE STEPFATHER WITHOUT MAKING A FINDING OF THE UNFITNESS OF THE FATHER.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT

WHETHER THE RIGHTS TO CONCEIVE AND RAISE ONE'S CHILDREN HAVE BEEN DEEMED ESSENTIAL BASIC RIGHTS OF MAN EMBODIED IN THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; AND THUS, THE SUPREME COURT OF PENNSYLVANIA ERRED IN AWARDING PRIMARY PHYSICAL CUSTODY OF THE CHILD TO THE STEPFATHER WITHOUT MAKING A FINDING OF THE UNFITNESS OF THE FATHER 15

CONCLUSION 15

APPENDIX

PENNSYLVANIA SUPREME COURT OPINION 1a

PENNSYLVANIA SUPERIOR COURT OPINION 15a

COURT OF COMMON PLEAS, ALLEGHENY COUNTY, FAMILY DIVISION OPINION 26a

RELEVANT ORDINANCE, STATUTORY CONSTITUTIONAL PROVISIONS INVOLVED 38a

TABLE OF AUTHORITIES

CASES

BAILES V. SOURS, 231 VA. 96, 340 S.E.2D 824 (1986) 12

BARSTAD V. FRAZIER, 118 WIS.2D 549, 348 N.W.2D 479 (1984) 11

BUNESS V. GILLEN, 781 P.2D 985 (ALASKA 1989) 11

CARDAMONE V. ELSHOFF, 659 A.2D 575 (PA. SUPER. 1995) ... 9

DAVIS V. COLLINSWORTH, 771 S.W.2D 329 (KY. 1989) 12

ELLERBE V. HOOKS, 416 A.2D 512 (PA. 1980) 9

FORD V. FORD, 172 W.VA. 25, 303 S.E.2D 253 (1983) 11

HENDRICKSON V BINKLEY, 316 N.E.2D 376 (IND.APP. 1974) .. 11

IN RE CUSTODY OF HERNANDEZ, 376 A.2D 648 (PA. SUPER. 1977) 8, 9

KAY V. ROWLAND, 285 S.C. 516, 517, 331 S.E.2D 781, 782 (1985) 12

KISSINGER V. SHOEMAKER, 425 N.E.2D 208 (IND. 1981) 11

LEWIS V. LEWIS, 406 A.2D 781, 783 (PA. SUPER. 1979) 8

LOTZ V. LOTZ, 146 A.2D 362 (PA. SUPER. 1958) 8

MATTER OF THE GUARDIANSHIP OF WILLIAMS, 254 KAN. 814, 869 P.2D 661 (1994) 12

MERRITT V. WAY, 58 N.Y.2D 850, 446 N.E.2D 776 (1983) 11

OEHLER V. CLINTON, 282 S.C. 25, 28, 317 S.E.2D 445, 447 (1984) 12

PATRICIA L.F. V. MALBERT J.F., JR., 420 A.2D 572 (PA. SUPER. 1980) 8

PETERSON V. ROGERS, 337 N.C. 397, 445 S.E.2D 901 (1994). 11

PRINCE V. MASSACHUSETTS, 321 U.S. 168 (1944).....8

ROWLES V. ROWLES, 668 A.2D 126 (1995) 9, 10, 11

SCHUH V. ROBERSON, 302 ARK. 305, 788 S.W.2D 740 (1990) 11

SPELLS V. SPELLS, 378 A.2D 879 (PA. SUPER. 1977).....8

STANLEY V. ILLINOIS, 405 U.S. 645 (1972) 8

TERRY V. SWEAT, 494 SO.2D 628 (ALA. 1986) 11

STATUTES

28 U.S.C. § 1254(1) 1

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court is reported at 744 A.2d 1255 (Pa. 2000) and can be found in the appendix at p. 1a. The opinion of the Pennsylvania Superior Court is reported in table format at 711 A.2d 1037 (Pa. Super. Ct. 1998) and can be found in the appendix at p. 15a. The opinion of the Court of Common Pleas of Allegheny County, Family Division is unreported and can be found in the Appendix at p. 26a

STATEMENT OF JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on January 19, 2000 (p. 9a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY, CONSTITUIONAL, ORDINANCE PROVISIONS INVOLVED

See Appendix p. 38a

STATEMENT OF THE CASE

On or about September 14, 1995, Randall Charles (Respondent, herein – hereinafter "Stepfather") presented a Petition for Appointment of a Guardian in the Orphans' Court Division of the Court of Common Pleas of Allegheny County, Pennsylvania. The Petition requested the appointment of a guardian for Matthew G. Stehlik (DOB: 3/3/89), then age 6, now age 11. According to the Petition, which requested the appointment of Stepfather as the child's guardian, the child's

mother had died on September 4, 1995 and the child's father, Richard Stehlik (Petitioner, herein – hereinafter "Father") resided in New Jersey. As the matter was more appropriately a custody matter, which would be addressed by the Family Division of the Court of Common Pleas of Allegheny County, Pennsylvania, the matter was transferred to that division and the Petition was re-presented on September 15, 1995 to the Honorable Ronald Folino, J. On that date, after oral argument, Judge Folino entered an Order of Court granting temporary custody of the child to Stepfather, maintaining Father's partial custody rights, and scheduling an expedited conciliation conference for October 5, 1995. At the conciliation conference, both Father and Stepfather indicated their desire to be the primary custodian of the child. As the parties were unable to resolve this issue, Judge Folino entered an Order of Court on October 10, 1995 requiring the parties and the child to participate in psychological and home evaluations.

As the parties were still unable to resolve the issue of who should be the primary custodian of the child after the evaluations, the matter proceeded to trial, which included several pre-trial videotape and oral depositions on August 15 and 16, 1996, December 12 and 13, 1996, December 26, 1996 and January 23, 1997. On February 26, 1997, Judge Folino issued the following Order of Court with regard to custody of the child:

> And now, this 26th day of February, 1997, after full hearing in open court, it is hereby ORDERED, ADJUDGED and DECREED as follows:
>
> 1. Randall A. Charles shall retain primary custody of the minor child, Matthew Stehlik, born March 3, 1989.

2. Richard Stehlik, biological Father of the Child, shall have partial custody as follows:

a. The second weekend of every month (or weekend on which the parties shall otherwise agree) from after school on Friday to the return to school on Monday. In the event that Monday is a school holiday, Richard Stehlik shall retain custody until the return to school on Tuesday. Except for extended weekends, this partial custody shall be conducted in the Pittsburgh metropolitan area or surrounding communities.

b. The parties shall alternate the four (4) day Thanksgiving holiday, beginning with Mr. Stehlik in 1997.

c. Unless the parties agree they shall alternate the Christmas (winter) holiday as follows: in even numbered years Mr. Stehlik shall have partial custody for the first half of Christmas holiday; in odd numbered years Mr. Charles shall have custody for the first half of the Christmas holiday.

d. The parties shall alternate the Easter (spring) holiday, beginning with Richard Stehlik in 1997.

e. In 1997, Mr. Stehlik shall have four (4) weeks of partial custody with Matthew during the summer, this shall increase to five (5) weeks in 1998 and six (6) weeks in 1999 and thereafter. Mr. Stehlik shall select his first two (2) weeks of summer custody time by April 1; Mr. Charles shall select his first two (2) weeks of summer custody time by April 7; Mr. Stehlik shall then select his remaining weeks of summer custody by April 21; Mr. Charles shall then select his remaining weeks of summer custody by April 28. Said selections shall be made in writing.

3. The parties shall equally share all holiday and summer custody transportation.

4. Within twenty (20) days of the date of this order, each party shall begin therapy with a licensed therapist, psychologist or psychiatrist in an effort to deal with hostility towards the other parent and in an effort to improve communications skills with

> the other parent and with Matthew regarding this custody arrangement.

BY THE COURT:
/s/ Folino, J.

This Order was appealed in a timely fashion to the Superior Court of Pennsylvania, who affirmed the trial court order in a Judgment and Memorandum Opinion (unpublished) dated January 9, 1998. A subsequent timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was granted. After the submission of Briefs and oral argument in the Supreme Court of Pennsylvania, an Opinion, Concurring Opinion, and Dissenting Opinion was entered on January 19, 2000.

Numerous witnesses were called to testify during the almost six days of trial. In brief, the significant testimony was as follows:

> The court-appointed psychologist testified that after his interviews with the parties and the child, it was his recommendation that custody of the child be awarded to the Stepfather. The court-appointed home evaluator testified that after his interviews with the parties and the child, it was his belief that the father-son relationship favored the Father over the Stepfather.

Both parties underwent drug and alcohol evaluations. Neither were found to have a chemical or alcohol dependency problem.

Stepfather testified that he married Matthew's mother (the late Linda Stehlik Charles) on July 21, 1990 and she died

of breast cancer on September 4, 1995. During most of the time they were married, Mrs. Charles was a homemaker. In addition to expressing his concerns about Father's parenting abilities, Stepfather stated that he was Matthew's "every-day dad". He testified that he believed that it would be in Matthew's best interest to remain with him and his daughter. Although Stepfather stated that he was willing to cooperate and facilitate partial custody visits between Matthew and his father, the evidence revealed several instances in which Stepfather had failed to do so. Also, Mr. Charles admitted that he had intentionally not informed Father of the death of Matthew's mother because he wanted to be "sure to have his day in court".

Father testified at great length. He stated that he is a fifty-three year old resident of New Jersey, where he has been a union electrician, employed primarily in New York City, for thirty-four years. He stated that he and Matthew's mother married on December 6, 1986 and separated on August 29, 1989. It was "a sad marriage"; however, he loved his step children, Kim and Kevin Bauer, very much. When his son, Matthew, was born on March 3, 1989, he was "ecstatic". The following August, his wife took his son and his stepchildren and moved to Pittsburgh, Pennsylvania. On April 23, 1990, Father and Mother entered into a custody arrangement wherein they had joint custody with Mother having primary physical custody in Pennsylvania and Father having partial physical custody one weekend per month in Pennsylvania, two one-week vacation periods and holidays. For the next five years, Father saw Matthew on a monthly basis, for week-long vacations and on numerous holidays, involving over 55,000 miles of traveling. Just prior to Mother's death, Father met with her in the hospital and agreed to allow Matthew to remain with Stepfather for a transition period of time. Father stated that he did not find out about Mother's death until a week after she died because he was informed by family members that she was "still lingering". Over the next several months, Father gathered information in preparation for Matthew coming to live

with him, including brochures on camps, information about schools, daycare and sports activities. (Copies of the brochures were introduced as exhibits.) Father then described the numerous difficulties that he had with Stepfather in arranging custody periods after Mother's death. Father then related different incidents with Matthew during his custody times, including visits with friends and relatives. Finally, Father stated that he believed that it was in Matthew's best interest to live with him and to visit with Stepfather.

Matthew Stehlik, the now eleven-year old subject of this custody action, was interviewed briefly in chambers by the Court. Matthew stated his name and told the Court what he liked to do with his father and his stepfather.

REASONS FOR GRANTING WRIT

I. THE RIGHTS TO CONCEIVE AND RAISE ONE'S CHILDREN HAVE BEEN DEEMED ESSENTIAL BASIC RIGHTS OF MAN EMBODIED IN THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; AND THUS, THE SUPREME COURT OF PENNSYLVANIA ERRED IN AWARDING PRIMARY PHYSICAL CUSTODY OF THE CHILD TO THE STEPFATHER WITHOUT MAKING A FINDING OF THE UNFITNESS OF THE FATHER.

The Due Process and Equal Protection clauses of the United States Constitution, as applied to the states through the Fourteenth Amendment, provides for a liberty interest in

custody matters. It should be recalled that this Honorable Court has repeatedly held that the rights of a natural parent to his/her child are of constitutional magnitude. In *Stanley v. Illinois*, 405 U.S. 645 (1972), one of the seminal cases dealing with the issue, this Court held that the rights to conceive and raise one's children have been deemed 'essential' basic rights of man; in fact, rights far more precious than property rights. Almost thirty years earlier, in *Prince v. Massachusetts*, 321 U.S. 168 (1944), this Honorable Court stated "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder".

Pursuant to Pennsylvania law, it is against public policy to limit or destroy the relationship of parent and child. *Commonwealth ex.rel. Lotz v. Lotz*, 146 A.2d 362 (Pa. Super. 1958). The appellate court's basic inquiry in child custody cases focuses upon the best interests of the child. *Commonwealth ex.rel. Patricia L.F. v. Malbert J.F., Jr.*, 420 A.2d 572 (Pa. Super. 1980). "Best interests" not only include the child's physical well-being, but also the child's intellectual, spiritual, and moral well-being. *Spells v. Spells*, 378 A.2d 879 (Pa. Super. 1977).

Further, "[i]n a contest between parents, each party bears the burden of proving that an award to that party would be in the best interests of the child." *Lewis v. Lewis*, 406 A.2d 781, 783 (Pa. Super. 1979), quoting *In re Custody of Hernandez*, 376 A.2d 648 (Pa. Super. 1977). Where, however, a parent and a third party dispute the custody of a child, "the manner of inquiry is more complex". *Commonwealth ex rel. Patricia L.F. v. Malbert J.F., Jr., supra*, quoting *In re Custody of Hernandez, supra*. Although the best interest of the child remains of paramount concern, the parent has "a 'prima facie right to custody', which will be forfeited only if 'convincing

reasons' appear that the child's best interest will be served by an award to the third party." *Id.*

> Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard to the parent['s] side. What the judge must do, therefore, is first, hear all evidence relevant to the child's best interest, and then, decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party's side.

Id., 376 A.2d at 654.

It should be remembered that in a custody dispute between a parent and a non-parent, "the non-parent bears the burden of production and the burden of persuasion and the non-parent's burden is heavy". *Cardamone v. Elshoff*, 659 A.2d 575 (Pa. Super. 1995), quoting *Ellerbe v. Hooks*, 416 A.2d 512 (Pa. 1980).

Moreover, the Pennsylvania Supreme Court, in *Rowles v. Rowles*, 668 A.2d 126 (1995), a plurality opinion, addressed the standard to be applied in deciding a custody dispute between parents and third parties. *Rowles* involved a dispute between the paternal grandparents/aunt and the natural mother. After discussing the above well-settled case law, Justice Flaherty, joined by two other Justices, abandoned the presumption that a parent has a prima facie right to custody as against third parties and decided that custody should be determined "by a preponderance of evidence, **weighing parenthood as a strong factor for consideration**." (Emphasis in original) The Court stated:

> Thus there is no single overriding factor; rather, courts should consider every fact relevant to the physical, emotional, intellectual,

> moral, and spiritual well-being of a child. Parenthood, though not paramount will always be a factor of significant weight. In *Ellerbe*, both opinions, representing all seven justices, agreed on several principles: "the parent-child relationship should be considered to be of importance in determining which custody arrangement is in the child's best interest", "special weight" and "deference" should be accorded the parent-child relationship, and the relationship should not be disturbed "without some showing of harm" or unless circumstances "clearly indicate the appropriateness of awarding custody to a non-parent". *Id.*, 490 Pa. at 366, 369, 370, 373, 416 A.2d at 513, 514, 515, 516-517. We adhere to these principles, for, in general, parents have a deep, abiding commitment to the well-being of their children. *Id.*, 668 A.2d at 128

When the Court in *Rowles* applied the above standard to the facts, it determined that the trial court had erred in awarding primary physical custody of the children to the paternal grandparents. The Court found that the trial court, which had been affirmed by the Superior Court, erred in finding that the good qualities of the grandparents outweighed the good qualities of the mother and that the grandparents' home had been the single stabilizing factor in the children's lives. In summarizing and explaining its decision, the Court stated:

> There is absolutely nothing in the record which casts doubt on the expectation that [Mother] bears normal human solicitude, care, devotion, and love for her offspring nor any fact which would justify denying the "special weight" and "deference" that are normally to be

> accorded the parent-child relationship. We cannot avoid the conclusion, on the record of this case, that the parental relationship is by far the most weighty factor in the custody determination, and that the countervailing consideration of the stable home provided by the grandparents is comparatively insignificant as the mother was a constant part of that stable environment.

Id., 668 A.2d at 130.

In numerous jurisdictions, the presumption in favor of the natural parent over a third party is so strong that it can only be overcome by a showing that the natural parent is unfit or has abandoned the child. *See, Terry v. Sweat*, 494 So.2d 628 (Ala. 1986); *Buness v. Gillen*, 781 P.2d 985 (Alaska 1989); *Schuh v. Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990); *Kissinger v. Shoemaker*, 425 N.E.2d 208 (Ind. 1981); *Merritt v. Way*, 58 N.Y.2d 850, 446 N.E.2d 776 (1983); *Peterson v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994); *Barstad v. Frazier*, 118 Wis.2d 549, 348 N.W.2d 479 (1984); *Ford v. Ford*, 172 W.Va. 25, 303 S.E.2d 253 (1983). Specifically, in *Kissinger v. Shoemaker, supra*, the Indiana Supreme Court addressed the issue of awarding custody of a child to the maternal grandparents over the natural father after the natural mother died. In finding that the maternal grandparents had failed to prove that the natural father was unfit and awarding custody to the natural father, the Court upheld the following three-step approach set forth by the Indiana Court of Appeals in *Hendrickson v Binkley*, 316 N.E.2d 376 (Ind.App. 1974): First, there is a presumption that it is in the child's best interest to be placed in the custody of his or her natural parents; second, this presumption is rebuttable only by a showing of unfitness of the natural parent, a long acquiescence by the natural parent, or voluntary relinquishment by the natural parent; and third, upon a showing of one of the rebuttable factors, only then would it

be in the child's best interest to be placed with a third party. The Supreme Court of Virginia, in *Bailes v. Sours*, 231 Va. 96, 340 S.E.2d 824 (1986) reached a similar conclusion in determining when the presumption in favor of the natural parents could be rebutted.

Notably, the Supreme Court of Kansas has found that absent a finding of unfitness, a natural parent has a fundamental right, established in the Due Process Clause, to have custody of his/her child. *In the Matter of the Guardianship of Williams*, 254 Kan. 814, 869 P.2d 661 (1994).

Additionally, according to the Supreme Court of Kentucky *in Davis v. Collinsworth*, 771 S.W.2d 329 (Ky. 1989), parental unfitness can only be proven by showing one or more of the following factors: (1) infliction of or allowing infliction of physical, sexual or emotional abuse; (2) moral delinquency on the part of the parent; (3) abandonment by the parent; (4) emotional or mental illness of the parent; and (5) failure of the parent to provide essential care for reasons other than poverty.

Moreover, the Supreme Court of South Carolina has stated, "when a custodial parent dies, the right to custody automatically reverts to the surviving parent". *Oehler v. Clinton*, 282 S.C. 25, 28, 317 S.E.2d 445, 447 (1984). In South Carolina, according to the same Court, "[o]nce the natural parent is deemed fit, the issue of custody is decided". *Kay v. Rowland*, 285 S.C. 516, 517, 331 S.E.2d 781, 782 (1985).

In the present case, the Supreme Court violated Father's constitutional right to Due Process and Equal Protection in awarding primary physical custody of the child, Matthew, to the Stepfather without a finding that the Father was an unfit parent. The Stepfather's attempt to paint Father as a violent, alcoholic were all soundly rejected by the trial court. Specifically, the trial court found that Father's alleged

"problem with anger" had never manifested itself toward Matthew in any physical way and there was no indication that it was likely to do so. (Trial Court Opinion at 13) Also, the trial court found that Father does not have an alcohol problem. (Trial Court Opinion at 14) Finally, the trial court made no finding that Father had a tendency toward violence and specially noted that he did not present a danger of physical harm to Matthew. (Trial Court Opinion at 18) Thus, the trial court, sitting as fact finder, which findings were adopted

by the Supreme Court, did not find Father to be an unfit parent or a parent who had abandoned his child or voluntarily relinquished custody of his child. Yet, the Supreme Court found it to be proper to award primary physical custody to a third party over a natural parent.

Equally as important, Father presented compelling evidence, most of which were not even addressed by the trial court, the Superior Court or the Supreme Court to support his fitness as a parent. Most significantly, Father has always been an integral part of this child's life. He did not "come out of the woodwork" after the child's mother died. Rather, according to his own uncontroverted testimony and demonstrative evidence, Father has visited with Matthew on a regular and frequent basis, including both weekends and extended vacation periods, in Pittsburgh and in New Jersey, taking him to the playground, swimming, the zoo, roller skating, museums, movies, skiing, and historical places. Conveniently, the Pennsylvania Supreme Court has failed to make any reference to these facts in its Opinion.

Father also presented evidence of his parenting plan and of his efforts to prepare for the child's arrival in New Jersey. This evidence, which was ignored by the trial court, the Superior Court, and the Supreme Court, showed that Father was not taking lightly the imminent presence of his son in his life on a full-time basis. He had formulated a plan; he had

readied his previously single life for the addition of his young son---he was a fit parent.

In conclusion, as the Stepfather has not proven Father to be an unfit parent in any manner, the Pennsylvania Supreme Court violated Father's constitutional rights to Due Process of Law and Equal Protection of the Law. WHEREFORE, it is respectfully requested that this Honorable Court grant certiorari in the within case.

CONCLUSION

For the above-stated reasons of law and fact, it is respectfully requested that this Honorable Court grant Petitioner, Richard Stehlik's, Petition for Writ of Certiorari, reverse the Order of the Supreme Court of Pennsylvania entered on January 19, 2000 and award custody of the child to Petitioner-Father.

Respectfully submitted,

RAPHAEL, RAMSDEN & BEHERS, P.C.
Melaine Shannon Rothey, Esquire
Counsel of Record
1200 Frick Bldg
437 Grant St
Pittsburgh, Pennsylvania 15219-6002
(412) 355-4726
Attorneys for Petitioner

April 11, 2000

(Any footnotes trail end of each document)
No. 11 W.D. Appeal Docket 1999

SUPREME COURT OF
PENNSYLVANIA

RANDALL A. CHARLES,
Appellee

v.

RICHARD STEHLIK,
Appellant

September 14, 1999, Argued

January 19, 2000, Decided

COUNSEL:
FOR Appellant, Richard Stehlik: Melaine Shannon Rothey, Esquire.

FOR Appellee, Randall A. Charles: Karen Hassinger, Esquire.

JUDGES:
COMPOSITION OF THE COURT: MR. CHIEF JUSTICE JOHN P. FLAHERTY, ZAPPALA, CAPPY, CASTILLE, NIGRO, NEWMAN, SAYLOR, JJ. Mr. Chief Justice FLAHERTY files a concurring opinion. Mr. Justice NIGRO files a dissenting opinion.

OPINIONBY:
CAPPY

OPINION:

OPINION

MR. JUSTICE CAPPY

This is a custody matter. The question at issue is whether the lower courts properly determined that Randall Charles ("Appellee"), who is the step-parent of the child in question, should have primary custody rather than Richard Stehlik ("Appellant"), who is the child's biological father. After careful review of this matter, we affirm.

Appellant and Linda Bauer ("Mother") were married on December 6, 1986. A son, who was named Matthew, was born to Appellant and Mother on March 3, 1989; this was the only child resulting from this marriage. In August of 1989, a few months after Matthew was born, Appellant and Mother separated. At that juncture, Mother moved from the marital residence in New Jersey to reside with her parents in Pittsburgh. Mother took with her Matthew and her two children from her first marriage, Kimberly and Kevin Bauer (referred to as "Kimberly" and "Kevin").

Mother subsequently met Appellee in Pittsburgh and married him on July 21, 1990. Mother and Appellee set up house with their new blended family consisting of the then one year old Matthew, Kimberly, Kevin, and Appellee's daughter, Jennifer. During Mother's marriage to Appellee, Mother had primary physical custody of Matthew. Appellee was very active in Matthew's life; so close was the relationship between the two that Matthew has always called Appellee "daddy".

In November of 1993, Mother was diagnosed with cancer. She ultimately succumbed to this disease, dying on September 4, 1995.

After Mother's death, Kimberly and Kevin moved to Virginia to live with their father without incident. Custody of Matthew, however, became a contested issue. On September 15, 1995, Appellee filed a complaint seeking primary custody of Matthew. This matter was assigned to the Honorable Ronald W. Folino. Extensive evidence was presented by several witnesses, including Appellant, Appellee, Jennifer, a few character witnesses, the therapist who treated Matthew following the death of Mother, and from William F. Fischer, Ph.D. ("Dr. Fischer"), a court-appointed psychologist.

The trial court relied heavily on the testimony of Dr. Fischer, whom the trial court found both credible and persuasive. Tr. ct. slip op. at 6-7. In formulating his opinion in this matter, Dr. Fischer conducted interviews and tests with the parties, Matthew, and Jennifer, Matthew's stepsister. Dr. Fischer also conducted telephone interviews with the therapist who helped Matthew cope with the death of Mother as well as a counselor who had been working with Appellant. After gathering all of this data, Dr. Fischer opined that it was "in Matthew's best interest to remain in the primary custody of [Appellee], at least for the present time." Tr. ct. slip op. at 7.

The trial court summarized the many factors on which Dr. Fischer based this opinion. First, Dr. Fischer pointed to the fact that on two separate occasions, Matthew spontaneously indicated[1] that "he wanted to stay with his dad here in Pittsburgh (i.e. [Appellee])." Tr. ct. slip op. at 7 (emphasis in the original); see also tr. ct. slip op. at 9. Dr. Fischer also testified that Matthew was more cheerful and relaxed when he accompanied Appellee to the sessions with Dr. Fischer than when Matthew accompanied Appellant. Tr. ct. slip op. at 7. Also, the pictures that Matthew drew while in the company of Appellant showed chaotic and sad scenes, tr. ct. slip op. at 7-8, while the ones he drew in the company of Appellee were "much more cheerful . . . ." N.T., 08/15/1996, at 25. Finally, Dr. Fischer testified that Matthew's loss of his mother would

make it "extremely difficult, if not traumatic, for Matthew to move to New Jersey at this time." Tr. ct. slip op. at 8.

The trial court also relied on the testimony provided by Jennifer LaRosa ("Ms. LaRosa"), the therapist who treated Matthew after Mother's death. Ms. LaRosa testified that Matthew felt a strong sense of abandonment whenever he would visit Appellant in New Jersey, and that he worried that he would not be brought back to Pittsburgh. Tr. ct. slip op. at 11-12.

Appellant and Appellee both testified. As to Appellant, the trial court found that he loves Matthew very much. Although the trial court was concerned about displays of "questionable judgment" and of anger on the part of Appellant, it noted that its "overall impression of [Appellant] . . . was that he is a good man and truly wants to be a loving (and loved) father." Tr. ct. slip op. at 14-15. The trial court, however, expressed concerns over Appellant's "capacity to withdraw and isolate himself from others," a trait which was clearly not in Matthew's best interests. Tr. ct. slip op. at 15.

The trial court found that Matthew's life centers on his home in Pittsburgh. The trial court referred to Appellee, who has lived with Matthew since Matthew was a year old, as Matthew's "day-to-day father". Tr. ct. slip op. at 4. The trial court found Appellee credible when he testified "that Matthew calls him dad or daddy[, and that Appellee] . . . treats Matthew like his son. . . ." Tr. ct. slip op. at 9. The trial court further noted that Pittsburgh is the only home that Matthew had ever known in his eight years of life. The court stated that "Matthew's school is here, his stepsister (Jennifer) is here, his maternal grandparents are here and his school friends are here." Tr. ct. slip op. at 9-10.

The trial court, therefore, concluded that as "Matthew has had such serious and traumatic changes and losses in his life

recently, it would not be healthy for him to suffer the additional loss of his day-to-day home and father and be required to move to a new home in New Jersey." Tr. ct. slip op. at 15-16. The trial court noted that it made this determination by applying the standard which states that a biological parent has a prima facie right to custody as against a third party, and that the scales are thus tipped hard in favor of the biological parent at the outset of the analysis.[2] The trial court found that this presumption in favor of the biological parent had been overcome in this matter as "the instant case offers compelling and convincing reasons why [Appellee] should . . . retain primary custody of Matthew at the present time." Tr. ct. slip op. at 17. The trial court, however, stressed that "Matthew's relationship with his biological father should continue and should be expanded." Tr. ct. slip op. at 16. The trial court's order thus provided that Appellant would have partial custody of Matthew, and the length of the summertime visits Matthew would spend with Appellant in New Jersey would gradually increase over the next several years.

The Superior Court affirmed on appeal. It determined that the trial court's conclusion to award primary custody to Appellee was supported by the record. The court also noted with approval the trial court's decision to order increasing visitation between Matthew and Appellant as it would be in the best interests of the child to maintain and strengthen his relationship with his biological father.

Appellant then filed a petition for allowance of appeal with this court and we granted allocatur.

In reviewing custody matters, this court has stated that our scope of review "is very broad. Nonetheless, a broad scope of review should not be construed as providing the reviewing tribunal with a license to nullify the factfinding functions of the court of the first instance." *Albright v. Commonwealth, ex rel. Fetters, 491 Pa. 320, 421 A.2d 157, 158-59 (Pa. 1980)* (citations omitted). We have stated that an

appellate court may not reverse a trial court's custody order absent a showing that the trial court abused its discretion. See *Robinson v. Robinson, 538 Pa. 52, 645 A.2d 836 (Pa. 1994).*

It is axiomatic that in custody disputes, "the fundamental issue is the best interest of the child." *Ellerbe v. Hooks, 490 Pa. 363, 416 A.2d 512, 513 (Pa. 1980).* In a custody contest between two biological parents, "the burden of proof is shared equally by the contestants . . . ." Id. Yet, where the custody dispute is between a biological parent and a third party, the burden of proof is not evenly balanced. In such instances, "the parents have a 'prima facie right to custody,' which will be forfeited only if 'convincing reasons' appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the [biological] parents' side." *416 A.2d at 514* (quoting *In re Hernandez, 249 Pa. Super. 274, 376 A.2d 648, 654 (Pa. Super. Ct. 1977)).* [3]

In the matter sub judice, the trial court properly noted that "the evidentiary scales were tipped hard in [Appellant's] favor." Tr. ct. slip op. at 17. Yet, even with Appellant having this presumption in his favor, the trial court nonetheless found that there were convincing reasons which compelled it to award primary custody of Matthew to Appellee. As noted supra, the trial court gave extensive reasons to support this conclusion. The most important factors to the trial court were that Matthew felt most at home in Pittsburgh with Appellee, the man he has known as "dad or daddy," tr. ct. slip op. at 9, since he was a baby. Furthermore, the trial court noted that considering the recent loss of his mother and his half-siblings, uprooting Matthew from his home, school, and the man he considers his "dad" could prove devastating to Matthew's present mental condition. In light of the circumstances of this case, we find that the trial court did not

abuse its discretion when it ordered Matthew to remain in the custody of Appellee.

Appellant takes issue with the trial court's determination. He first contends that the trial court's decision is not supported by sufficient evidence because the trial court based its determination solely on the testimony of Dr. Fischer, a witness who had little opportunity to observe the parties. This claim must fail. First, although the trial court did rely heavily on the testimony of Dr. Fischer, such testimony was certainly not the only basis for the trial court's opinion. The trial court based its opinion on the testimony of several witnesses, including Appellant, Appellee, Jennifer, Ms. LaRosa, and many character witnesses.

Also, the record does not bear out Appellant's claim that Dr. Fischer's contact with the parties was so minimal that he could not form an opinion in this matter. Dr. Fischer conducted a series of interviews with the parties in the winter of 1995-1996; he also conducted telephone interviews with Ms. LaRosa as well as a counselor who had been working with Appellant. In addition, Dr. Fischer conducted another series of interviews in December 1996-January 1997. We cannot agree with Appellant that Dr. Fischer's knowledge of the dispute at issue was so shallow that the trial court erred in crediting his testimony.

Next, Appellant argues that Appellee should have been required not only to prove that there were convincing reasons as to why Matthew should remain with Appellee, but also that Appellant was an unfit parent. In support of his position, Appellant notes that several of our sister states have adopted the standard whereby a biological parent will always prevail over a third party in a custody dispute unless there has been an affirmative showing that the biological parent is unfit or has abandoned the child. See, e.g., *Terry v. Sweat, 494 So. 2d 528 (Ala. 1986); Schuh v. Roberson, 302 Ark. 305, 788 S.W.2d 740 (Ark. 1990); Petersen v. Rogers, 337 N.C. 397,*

445 S.E.2d 901 (N.C. 1994); Barstad v. Frazier, 118 Wis. 2d 549, 348 N.W.2d 479 (Wis. 1984). He claims that if this court were to adopt such a standard, we would have to reverse the trial court for not only did Appellee fail to establish that Appellant was an unfit parent, but Appellant also presented extensive evidence showing his fitness to have custody of Matthew.

We agree with Appellant that some of our sister states do employ such a standard. This court, however, has explicitly declined to follow such a path. In *Albright v. Commonwealth, ex rel Fetters, 491 Pa. 320, 421 A.2d 157, 161 (Pa. 1980),* we stressed that the biological parent's prima facie right to custody is not to be construed as precluding a custody award to a non-parent, absent a demonstration of the parent's dereliction. We again emphasize that the standard seeks only to stress the importance of parenthood as a factor in determining the best interests of the child. However, other factors which have significant impact on the well being of the child can justify a finding in favor of the non-parent, even though the parent has not been shown to have been unfit.

We see no reason to abandon our Albright holding. As noted supra, "the cardinal concern in all custody cases is the best interest and permanent welfare of the child." *421 A.2d at 158.* In staying true to that maxim, we have decreed that there will be instances where it is proper to award custody to the third party even where there has been no showing that the biological parent is unfit. While this Commonwealth places great importance on biological ties, it does not do so to the extent that the biological parent's right to custody will trump the best interests of the child. In all custody matters, our primary concern is, and must continue to be, the well-being of the most fragile human participant - that of the minor child. We therefore reject Appellant's argument.

For the foregoing reasons, the order of the Superior Court is affirmed.

Mr. Chief Justice Flaherty files a concurring opinion.

Mr. Justice Nigro files a dissenting opinion.

Judgment entered January 19, 2000.

----------Footnotes----------

[1] Dr. Fischer stressed that he never asked Matthew whether he would prefer to reside with Appellant or Appellee as to do so would be "to ask a child to betray one of the parents." N.T., 08/15/1996, at 21.

[2] Although the trial court did not cite to a specific case in support of applying this standard, it was clearly referring to this court's decision in *Ellerbe v. Hooks, 490 Pa. 363, 416 A.2d 512 (Pa. 1980)*. Ellerbe will be discussed at length infra.

[3] A few years ago, a plurality of this court indicated that it desired to "abandon the presumption that a parent has a prima facie right to custody against third parties . . . ." *Rowles v. Rowles, 542 Pa. 443, 668 A.2d 126, 128 (Pa. 1995)*. Instead, the plurality favored the adoption of a standard which would "eliminate the presumption per se, and mandate that custody be determined by a preponderance of the evidence, weighing parenthood as a strong factor for consideration . . . ." Id. (citations omitted). This position did not, however, garner a vote of the majority of the court.

CONCURBY:
FLAHERTY

CONCUR:

CONCURRING OPINION

MR. CHIEF JUSTICE FLAHERTY

I concur in the affirmance of the award of custody to appellee, but write separately to express that I favor the approach to custody determinations set forth in my concurring opinion in *Ellerbe v. Hooks*, *490 Pa. 363, 371-74, 416 A.2d 512, 515-17 (1980)*, which was followed by a plurality of this court in *Rowles v. Rowles*, *542 Pa. 443, 668 A.2d 126 (1995)*. That approach discards the presumption that a parent has a prima facie right to custody against third parties and substitutes a standard requiring that custody be determined by a preponderance of the evidence, weighing parenthood as a strong factor for consideration. *Id. at 447, 668 A.2d at 128.*

DISSENTBY:
NIGRO

DISSENT:

DISSENTING OPINION

MR. JUSTICE NIGRO

I respectfully dissent, as I believe that the standard set by the cases from our sister jurisdictions is the one we should follow. The supreme courts of North Carolina, Iowa, Arkansas, Alabama and Wisconsin have all upheld a presumption in favor of granting custody to a natural parent as against a third party which shall only be overcome by showing that the natural parent is unfit or unable to assume parental responsibilities.[1]

When two natural parents each seek custody of their child pursuant to a separation or divorce, the courts are forced to choose and therefore "best interests of the child" is the proper standard. Thus, absent true joint custody, one parent will prevail over the other -- even if by the slimmest of

margins. In a highly mobile society, additionally fraught with the vagaries of modern relationships, those initial custody decisions may have a long-term effect of severing the child/non-custodial-parent ties equivalent to terminating that parent's parental rights. "The day to day contact between the child and one having custody can create a relationship that may leave the birth parent almost an intruder. All of the day to day interactions between a parent and child are bound to be diminished if not eliminated where the parent comes on the scene as a court permitted 'visitor'." *Barstad v. Frazier, 118 Wis. 2d 549, 348 N.W.2d 479, 483 (Wis. 1984).*

I believe, as does the Supreme Court of Alabama, that the prima facie right of a natural parent to the custody of his or her child, as against the right of custody of a nonparent, is grounded in the common law concept that the primary parental right of custody is in the best interest and welfare of the child as a matter of law. So strong is this presumption, absent a showing of voluntary forfeiture of that right, that it can be overcome only by a finding, supported by competent evidence, that the parent seeking custody is guilty of such misconduct or neglect to a degree which renders that parent an unfit and improper person to be entrusted with the care and upbringing of the child in question.

Terry v. Sweat, 494 So. 2d 628 (Ala. 1986) (quoting *Sullivan v. Mooney, 407 So. 2d 559 (Ala. 1981))* (emphasis added).

Furthermore, I believe that natural parents have a constitutionally protected paramount right to custody, care and control of their child whenever there is no evidence that the parents were unfit or neglected the child's welfare. While the United States Supreme Court has not specifically addressed the question of what the Constitution requires in a custody dispute between a parent and a nonparent third party, in other cases in the parental rights arena it has said the rights to conceive and to raise one's children have been deemed

"essential," *Meyer v. Nebraska, 262 U.S. 390, 399 [43 S. Ct. 625, 626, 67 L. Ed. 1042]* (1923), "basic civil rights of man," *Skinner v. Oklahoma, 316 U.S. 535, 541 [62 S. Ct. 1110, 1113, 86 L. Ed. 1655 (1942)* and "rights far more precious . . . than property rights," *May v. Anderson, 345 U.S. 528, 533 [73 S. Ct. 840, 843, 97 L. Ed. 1221]* (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts, 321 U.S. 158, 166 [64 S. Ct. 438, 442, 88 L. Ed. 645]* (1944).

Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901, 903 (N.C. 1994).

As the natural parent's rights in this regard are so fundamental, I would abrogate them only rarely and only in the most extraordinary circumstances, as where there is a judicial finding of persistent neglect of parental responsibilities. Therefore, similar to this Court's majority opinion, I would find that as between a natural parent and a third party the presumption of custody is tipped hard in the natural parent's favor. I differ from the majority, however, in that I would find that the presumption can only be overcome by placing on the nonparent third party the considerable burden of establishing the extraordinary circumstance that the natural parent has violated his parental responsibilities or has been determined to be judicially unfit.

In the instant matter, as the third party nonparent failed to establish that the natural father violated his parental responsibilities or was unfit, I would award primary custody to the natural father.

----------Footnotes----------

[1] See *Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (N.C. 1994); In re Marriage of Halvorsen, 521 N.W.2d 725 (Iowa 1994); Schuh v. Roberson, 302 Ark. 305, 788 S.W.2d 740 (Ark. 1990); Terry v. Terry, 494 So. 2d 634 (Ala. 1986); Barstad v. Frazier, 118 Wis. 2d 549, 348 N.W.2d 479 (Wis. 1984).*

501 PITTSBURGH 1997 (J. A54034/97)

SUPERIOR COURT OF PENNSYLVANIA

January 9, 1998, Filed

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this: Court that the judgment of the Court of Common Pleas of ALLEGHENY County be, and the same is hereby AFFIRMED
BY THE COURT:

DEPUTY PROTHONOTARY
JANUARY 9, 1998

501 PITTSBURGH 1997 (J. A54034/97)

SUPERIOR COURT OF PENNSYLVANIA

Appeal from the Order dated February 26, 1997, docketed February 27, 1997, Court of Common Pleas, Allegheny County, Family Division at No. FD 95-10556.

BEFORE: JOHNSON, EAKIN and BROSKY, JJ.
MEMORANDUM:
FILED: JANUARY 9, 1998

Richard Stehlik ("father") appeals from the order that granted primary physical custody of his eight-year-old son ("the child") to Randall A. Charles ("stepfather"). We affirm.

Father and the child's mother were married in December 1986 and separated in August 1989, when the child was six months old. They divorced shortly thereafter. Mother took the child and his two half-siblings from her first marriage and left father's home in New Jersey, returning to live with her parents in Pittsburgh, Pennsylvania. Mother married stepfather in July 1990, and the child, mother's other children, and stepfather's daughter lived as a blended family in the Pittsburgh area. During this time, Mother had primary physical custody of the child, and father had partial custody, consisting of one weekend per month in the Pittsburgh area and approximately two non-consecutive weeks of vacation time each summer with the child in New Jersey.

This arrangement continued until Mother's untimely death on September 4, 1995. Soon after Mother's death, the child's two half-siblings were placed in the custody of their natural father in Virginia. Stepfather filed a complaint

seeking primary physical custody of the child on September 14, 1995. Father also sought primary custody. The case came before the Honorable Ronald W. Folino of the Family Division of the Allegheny County Court of Common Pleas. Several days of hearings were conducted over a span of several months during 1996 and early 1997. In February 1997, Judge Folino ordered that stepfather retain primary physical custody of the child and that father have partial custody as follows:

> a. The second weekend of every month (or weekend on which the parties shall otherwise agree) from after school on Friday to the return to school on Monday. In the event that Monday is a school holiday, [father] shall retain custody until the return to school on Tuesday. Except for extended weekends, this partial custody shall be conducted in the Pittsburgh metropolitan area or surrounding communities.
>
> b. The parties shall alternate the four (4) day Thanksgiving holiday, beginning with [father] in 1997.
>
> c. Unless the parties agree otherwise, they shall alternate the Christmas (winter) holiday as follows: in even numbered years [father] shall have partial custody for the first half of Christmas holiday; in odd numbered years [stepfather] shall have custody for the first half of the Christmas holiday.
>
> d. That parties shall alternate the Easter (spring) holiday, beginning with [father] in 1997.
>
> e. In 1997, [father] shall have four (4) weeks of partial custody with [the child] during the summer,

this shall increase to five (5) weeks in 1998 and six (6) weeks in 1999 and thereafter.

Order, dated February 26, 1997. This appeal followed. Father raises four issues for our review:

> I. THE TRIAL COURT ERRED IN AWARDING PRIMARY PHYSICAL CUSTODY OF THE CHILD TO THE APPELLEE-STEPFATHER.
>
> II. THE TRIAL COURT ERRED IN PERMITTING COUNSEL FOR PLAINTIFF TO ENGAGE IN DISCOVERY ON THE DAY SCHEDULED AS THE FINAL DAY FOR TRIAL.
>
> III. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY AND EXHIBITS CONCERNING AN INCIDENT OF DOMESTIC VIOLENCE THAT WAS REMOTE IN TIME.
>
> IV. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO STRIKE THE SUPPLEMENTAL TESTIMONY OF THE COURT-APPOINTED EVALUATOR.

Brief for Appellant at 1.

The scope of appellate review in a case involving a child custody order is plenary; an appellate court is not bound by the deductions or inferences made by the trial court from its factual findings, nor must this Court accept a finding that is not supported by competent evidence. JAL V. E.P.H., 682 A.2d 1314, 1318 (Pa.Super. 1996). This broad scope of review, however, does not invest the reviewing court with the authority or the privilege of making its own independent evaluation of the merits of the case. Id. Rather, "an appellate

court is empowered to determine whether the trial court's incontrovertible factual findings support its factual conclusions, but it may not interfere with those conclusions unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion." Id., quoting McMillen v McMillen, 529 Pa. 198, 202, 602 A.2d 845, 847 (1992). Further, an appellate court defers to the trial judge's rulings relating to issues of credibility and weight of the evidence, because the trial judge has had the opportunity to observe the proceedings and the demeanor of the witnesses. Robinson v. Robinson, 538 Pa. 52, 55-56, 645 A.2d 836, 837 (1994). Only where the appellate court determines that the custody order is manifestly unreasonable as shown by the evidence of record will it interfere with the trial court's determination. Id.

It is axiomatic that the paramount concern in these cases is the best interests of the child. J.A.L., supra; Robinson, supra. Moreover, in a dispute between a natural parent and a third party (here, a stepparent), we recognize that the biological parent has a prima facie right to custody. Rowles v. Rowles, 542 Pa. 443, 668 A.2d 126 (1995); J.A.L. supra. This prima fade presumption in favor of the biological parent does not mean that an interested third party may never obtain primary custody of a child as against the biological parent. Rather, "the natural parent's prima facie right to custody has the effect of increasing the evidentiary burden on the non-parent seeking custody." J.A.L., supra, at 1319. The parent's right to custody will only be forfeited if convincing reasons appear that the child's best interests will be served by awarding custody to the third party. This standard has been described in the following manner:

> "even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parents' side. What the judge must do, therefore, is first, hear all evidence relevant to the child's best interest, and

> then, decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party's side."

Karner v. McMahon, 640 A.2d 926, 930 (Pa.Super. 1994), quoting In re Custody of Hernandez, 376 A.2d 648, 654 (Pa.Super. 1977). The non-parent's burden in these cases is a heavy one. Id.

Here, father argues that the court erred in granting primary physical custody of the child to stepfather because stepfather failed to present convincing reasons that would cause the scales to tip in his favor. The court explained the reasons for its decision:

> After reviewing all the testimony, I determined that it is in [the child's] best interest to remain in Pittsburgh and to have substantial and increasing partial custody with his biological father in New Jersey. [The child] has had such serious and traumatic changes and losses in his life recently, it would not be healthy for him to suffer the additional loss of his day-to day home and father and to be required to move to a new home in New Jersey. There is no question that [the child] would feel safer and happier by staying here in Pittsburgh at the present time. In fact, Dr. Fischer is concerned that a move to New Jersey could actually put [the child] in a state of depression.

Trial Court Opinion, filed June 5, 1997, at 15-16. The court further stated that, initially, the "evidentiary scales were tipped hard in [father's] favor. Despite this . . . the instant case offers compelling and convincing reasons why [stepfather] should nevertheless retain primary custody of [the child] at the present time." Id. at 17. The trial court made

this determination after reviewing the voluminous testimony received in this case, including that from stepfather; father; the court-appointed psychologist, Dr. William F. Fischer; stepfather's daughter, Jennifer; the child's therapist, Dr. Jennifer P. LaRosa; and several other parties who testified on behalf of both parties.

Although father asserts that the trial court ignored the testimony of his expert in this case, we find no evidence of this. The court simply made a credibility determination, something that it is empowered to do, in fact required to do, in these cases. As father points out, the evidence supports the conclusion that father has been an interested and involved parent, travelling for many miles on the interstate to spend time with his son. The trial court recognized this, and thus determined that it was important for the child to maintain his connection to his father. Hence the regular visits and the increased visitation schedule. Moreover, despite stepfather's vehement assertions to the contrary, the court specifically found that father did not have a problem with alcohol and did not present a danger of physical harm to the child. Opinion, supra at 14, 18. After weighing all the competing interests, however, the court determined that the child's best interests, at least for the time being, require an award of custody to stepfather.

An important factor in this determination was the recommendation of Dr. Fischer, who summarized his conclusions as follows: the child feels most at home with stepfather; the child has suffered several losses in his young life (i.e., the death of his mother and the removal of his half-siblings to their natural father's Virginia home), and to uproot him to live in New Jersey with his father would be another loss that could lead to depression; what the child needs most at this point in his life is stability; although both father and stepfather obviously love the child very much, they are

tearing him apart with the custody battle. N.T., January 23, 1997, at 36, 37.

After reviewing the several volumes of the notes of testimony and the evidence of record, we conclude that the trial court's conclusion is supported by the record. We emphasize that this Court cannot re-weigh the evidence or make credibility determinations regarding the testimony presented at trial. Robinson, supra. We agree that stepfather has established compelling reasons to support the conclusion that this child's best interests lie in remaining in the only stable home that he has known. J.A.L., supra. However, we also agree with the court that it is important for the child to get to know and respond appropriately to father as well. The continued visitation schedule, including the increased summer visitation, also serves the child's best interests. The trial court considered many competing factors in this case and did not err or abuse its discretion in fashioning its well-considered custody order. Thus, we conclude that father's first issue is without merit.

Father next contends that the court erred in permitting stepfather to engage in discovery on the day scheduled as the final day of trial. During the cross-examination of father, stepfather's counsel asked the court for permission to obtain father's authorization for Dr. Fischer to contact a therapist that father had seen many years ago. Although the court noted its displeasure at the request being made at such a late date, it granted the request. N.T., December 12-13, 1996, at 415.

Stepfather argues that the court did not abuse its discretion because it has the duty of creating a full and complete record when a decision as important as the welfare of a child is at issue. Costello v Costello, 666 A.2d 1096 (Pa.Super. 1995). We agree.

> "As we have cautioned the lower courts time and time again, in order to assess the best interests and general welfare of the child or children, it is the duty of the trial judge to make the fullest possible inquiry in custody actions. All pertinent facts and circumstances surrounding the contesting parties must be fully explored and developed. The hearing judge should consider the character and fitness of the respective parties, the type of home they can offer, [and] their ability to financially provide for the child."

Costello, supra, at 1098, quoting Moore v Moore, 535 Pa. 18, 25, 634 A.2d 163, 167 (1993) (internal citations omitted).

Here, the information requested related to therapy that father underwent following the breakup of his marriage to the child's mother. This therapy occurred over the course of several years. Stepfather argued that the therapist could have relevant information regarding father's alleged problems dealing with his anger and his alleged propensity for violence against his former wife, the child's mother. The information is relevant to the issue of whether father had the potential to be abusive toward his son. Moreover, the delay resulting from obtaining this additional information was less than two weeks. The court did not err in this regard. Costello, supra.

Father next contends that the court erred in admitting into evidence testimony and exhibits concerning an incident of domestic violence that was remote in time. The incident in question occurred in May 1988 between father and the child's mother, his then wife. Father urges this Court to find that the evidence was too remote to the time in question, and that the evidence was irrelevant because it did not concern his treatment of the child. The court explained that it permitted this testimony because:

> it must satisfy itself that the court ordered custody arrangement is not likely to result in physical harm to the child. Thus, this testimony was relevant. Moreover, this court ultimately determined, after considering all of the evidence, that [father] did not present a danger of physical harm to [the child]. Thus, the receipt of the subject testimony did not prejudice [father's] case.

Opinion, supra, at 17-18.

Under the child custody laws of Pennsylvania, the court "shall consider each parent and adult household member's present and past violent or abusive conduct which may include, but is not limited to abusive conduct as defined under . . . the Protection From Abuse Act." 23 Pa.C.S. § 5303(a). Father's actions in 1988 resulted in the New Jersey equivalent of a PFA order being entered against him, and resulted in father being treated by a psychologist. Father's history regarding abuse is clearly relevant, and the fact that the incident was remote in time and occurred before the child was born is a matter that relates to the proper weight given to the testimony, not its admissibility. The court did not err in this regard.

Finally, father argues that the court erred in denying his motion to strike the supplemental testimony of Dr. Fischer. As stated above, on the last day originally scheduled for testimony in this case, the court granted stepfather's request and permitted Dr. Fischer to interview father's therapist. The court then scheduled an additional court date, December 26, 1996, to permit Dr. Fischer to testify about his findings. On that date, the court, counsel, and Dr. Fischer conducted an in chambers conference. At this conference, Dr. Fischer indicated that he wished to interview the child one last time before making his final recommendation to the

court. The court then scheduled the final hearing for January 23, 1997.

Dr. Fischer was the only witness at this hearing. Following Dr. Fischer's testimony, father objected, asserting that there had been ex parte communications between Dr. Fischer and stepfather's counsel prior to the hearing on December 26, and that Dr. Fischer would not have sought to interview the child again but for this ex parte communication. Father thus requested that Dr. Fischer's supplemental testimony be stricken in its entirety. The court permitted father to depose stepfather's counsel regarding the issue of ex parte communications, but ultimately denied the motion to strike Dr. Fischer's supplemental testimony. Order, dated February 7, 1997.

In its opinion, the trial court explained its reasons for permitting the additional testimony by Dr. Fischer.

> Because Dr. Fischer was the court appointed psychologist, obviously, the court was interested in hearing his testimony. The January, 1997 testimony related to Dr. Fischer's follow-up meetings with [the child] and the parties. These follow-up meetings resulted in only a slight continuance (approximately three weeks) in the final hearing date. Before I made this most serious decision concerning [the child's] life, I wanted to have the most recent information available to me.

Opinion, supra at 18-19.

A review of the record reveals no evidence of an improper communication between Dr. Fischer and stepfather's counsel. Moreover, Dr. Fischer merely re-stated at the January hearing his initial recommendation, that the

child remain with stepfather. We therefore fail to see how father has been prejudiced by the introduction of this supplemental testimony. It had been almost one full year since Dr. Fischer had last seen and interviewed the child. We commend the court for fully exploring the circumstances surrounding this case before making this critical decision in the child's life. Costello, supra. The court did not err in denying father's motion to strike.

Based upon the foregoing, we affirm the trial court's award of primary physical custody of the child to stepfather, and the award to father of increased partial custody for one weekend each month, during the summer months, and alternating holidays. The trial court diligently and scrupulously sought to find a solution that served the best interests of the child in this case. We encourage both stepfather and father to ensure that the child maintains his relationship with each party, as that is the only solution that is clearly in the best interests of this child.

Order AFFIRMED.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

FAMILY DIVISION No.FD95-10556

Superior Court 00501PGH97

OPINION

RANDALL A. CHARLES,
Plaintiff,
vs
RICHARD STEHLIK,
Defendant.

Counsel for Plaintiff:

Karen Hassinger, Esquire
415 Washington Trust Building
Washington, PA 15301

Counsel for Defendant:

Melanie S. Rothey, Esquire
35th Floor Grant Building
Pittsburgh, PA 15241
J.

JUDGE RONALD W. FOLINO

December 6, 1986, separated two and one-half years later, on August 29, 1989 (just a few months after Matthew was born), and divorced on July 11, 1990. Their short marriage was certainly unhappy and apparently included some incidents of

domestic violence. A Consent Final Order under the *Prevention of Domestic Violence Act was entered by The* Superior court of New Jersey on June 2, 1988. In that order:

> the parties were prohibited from having any physical contact with each other; Mr. Stehlik was directed to receive professional counseling at the ACT (Abuse Ceases Today) Program; and Mother was directed to receive professional counseling at the Jersey Battered Women's Shelter.

During this marriage, Mother also had custody of her two children from her first marriage, Kimberly and Kevin Bauer. On August 29, 1989 (at which time Matthew was approximately six months old), Mother left the marital residence and moved to Pittsburgh to live with her parents. She brought all of her children with her. A few months later (on November 3, 1989), Mother met Randall Charles, and approximately nine months after that, on July 21, 1990, they were married.

Mother finally found happiness in this marriage. Over the next five years, Mother and her three children lived as a strong and loving family with Randall Charles and his daughter, Jennifer. During all this time, Mother had primary physical custody of Matthew. Mr. Stehlik had partial custody of Matthew one weekend per month in the Pittsburgh area and approximately two non-consecutive weeks per year in New Jersey.

Thus Matthew has lived primarily with Mr. Charles virtually his entire life. Matthew knows and loves Mr. Charles as his day-to-day father. During these first years of his life, Matthew also developed a deep and loving attachment to his stepsister Jennifer and to his half sister, Kim, and half brother, Kevin. Tragically, Matthew's happy

childhood was changed irreparably when his Mother became gravely ill in 1995 and died on September 4, 1995.

On or about September 15, 1995, Mr. Charles filed a complaint in the Court of Common Pleas of Allegheny County seeking primary custody of Matthew. After numerous efforts at amicable resolution failed, a five day trial[1] was held before this court. At the close of evidence, this court entered an order dated February 26, 1997 stating that Mr. Charles shall retain primary custody and that Mr. Stehlik shall have partial custody as follows:

> The second weekend of every month from after school on Friday to the return to school on Monday (or Tuesday if Monday is a holiday); alternating four day Thanksgiving holiday; alternating Easter holiday; one-half of the Christmas holiday every year; and four weeks of summer vacation in 1997, five weeks of summer vacation in 1998 and six weeks of summer vacation in 1999 and thereafter.

As set forth above, Mr. Stehlik filed the within appeal

In his Concise Statement of Matters Complained of on Appeal, Mr. Stehlik argues that this court erred (a) in awarding primary custody of the child to the plaintiff-stepfather, (b) in admitting into evidence testimony and exhibits concerning an incident of domestic violence that was remote in time, (c) in permitting counsel for plaintiff to engage in discovery on the day scheduled as the final day of trial, (d) in denying the defense motion to strike the January, 1997 testimony of William Fischer, Ph.D., the court appointed psychologist, (e) in permitting the plaintiff to admit into evidence certain correspondence and (f) in overruling the objections of defense counsel.

Discussion

Mr. Stehlik's first and principal contention on appeal is that this court erred in awarding primary custody of Matthew to Mr. Charles.

Early in these proceedings, this court appointed William F. Fischer, Ph.D., to perform a disinterested psychological evaluation of all appropriate persons and to submit a report including a recommendation of a custody arrangement that would be in Matthew's best interest. Dr. Fischer is an experienced clinical psychologist with impressive academic and professional credentials; there was no objection to his testifying as an expert. Dr. Fischer interviewed and tested the parties and observed their interactions with Matthew. In addition,, Dr. Fischer conducted telephone interviews with other appropriate persons, namely, Jennifer LaRosa, M.S., a therapist who helped Matthew to cope with the loss of his mother, and Margaret Smith, M.S . W., a counselor who has been working with Mr. Stehlik. Dr. Fischer testified credibly and persuasively that it is in Matthew's best interest to remain in the., primary custody of Mr. Charles, at least for the present time.

There were several indicators revealed to Dr. Fischer that such an arrangement would allow Matthew to be healthier and happier. For example, although Dr. Fischer considers it exceedingly inappropriate to ask a child of this age where he wants to live (because you are asking the child, in effect, to betray one of the parents), Matthew spontaneously told Dr. Fischer that he wanted to stay with his dad here in Pittsburgh (i.e. Randall Charles). Matthew made this spontaneous statement to Dr. Fischer even though Matthew's biological Father, Mr. Stehlik, had brought him to that particular session.

In addition, Dr. Fischer asked Matthew to draw a house, tree and person during the interactional session with each of the parties. During the session in which Matthew was accompanied by Mr. Stehlik, Matthew drew and described: a tree that was a Christmas tree falling down and half the ornaments falling off because Santa Claus knocked it down; a house with no people inside, just fire; and a person who was six million years old, and dying, no one will miss him because, he is rude.

Dr. Fischer credibly testified that the child was much more cheerful and relaxed when he was accompanied by Mr. Charles. Also, at this session, Matthew drew much more cheerful pictures.

Dr. Fischer credibly testified that the loss of Matthew's Mother makes it extremely difficult, if not traumatic, for Matthew to move to New Jersey at this time. Dr. Fischer credibly testified that Matthew would be very angry with Mr. Stehlik if Matthew were to move to New Jersey because Matthew would feel that he is being taken away from a man (Mr. Charles) who loves him. Matthew would not understand that Mr. Stehlik would be uprooting him out of Mr. Stehlik's love.

Because a period of time elapsed between Dr. Fischer's evaluation of the parties and the trial itself, I requested Dr. Fischer to meet with the parties again, near the conclusion of trial, and to provide a brief update to his report. Dr. Fischer did so and subsequently testified that he remained firm in his conviction that the boy should live primarily with Mr. Charles and should be encouraged to see and further develop his relationship with Mr. Stehlik. In the course of this later meeting with Matthew on December 31, 1996, Dr. Fischer asked Matthew if there was anything he could do to make his (Matthew's) life better. Dr. Fischer testified that

Matthew looked directly at him and replied, "I want you to tell the judge that I want to live here in Pittsburgh."

Mr. Charles credibly testified that he and Matthew love each other very much and that Matthew calls him dad or daddy. Mr. Charles credibly testified that he treats Matthew like his son, and has done so throughout Matthew' s life. He bathes Matthew and takes him to the doctor. He puts Matthew in bed at night and tucks him in. He taught Matthew to play baseball.

Mr. Charles credibly testified that he is pursuing this custody matter because he sincerely believes it is in Matthew's best interest to remain with him.

Mr. Charles credibly testified that Matthew' s home here in Pittsburgh is the only real home Matthew has ever known in the eight years of his life. Matthew's school is here, his stepsister (Jennifer) is here, his maternal grandparents are here and his school friends are here.

Mr. Charles credibly testified that there have been some very traumatic changes in Matthew' s life recently. The most significant, of course, was the death of Matthew's mother on September 4, 1995. In addition, however, Matthew's half brother and half sister, Kimberly and Kevin Bauer, with whom Matthew was very close, have moved to Virginia to live with their father. Thus, during the course of a single year, Matthew has lost his mother, brother and sister. It is not in his best interest to also lose, at this time, his day-to day father, Randall Charles.

Mr. Charles also credibly testified that he would cooperate with Mr. Stehlik to make sure that Mr. Stehlik had partial custody time with Matthew. Mr. Charles recognizes

that the relationship between Matthew and his biological father is important.

Matthew is also very close to his stepsister, Jennifer. Jennifer recently married and had a baby, but she' and her husband and baby continue to live in the home with Randall Charles and Matthew. Jennifer credibly testified that she loves Matthew and that, in her eyes, he is her brother. Jennifer credibly testified that she and her new husband do not have immediate plans (or the financial means) to leave the residence. Her presence in Pittsburgh is another factor suggesting that Matthew's primary residence should remain with Mr. Charles.

Mr. Stehlik argues that Jennifer, her husband and her new baby may soon leave the Pittsburgh area. If this should occur, however, it will represent yet another loss for Matthew. In such a case, Matthew' s need for the love and consistency of Mr. Charles becomes, if anything, yet stronger.

Jennifer also credibly testified as follows: she is the biological daughter of Randall Charles; Mr. Charles raised her during part of her life as a single parent; Mr. Charles took good care of her and at the same time was able to maintain a full time job; the Charles family has a very strong family structure; Matthew, ever since he was old enough to talk, has called Mr. Charles "dad".

Jennifer P. LaRosa was the therapist who treated Matthew for approximately eight months following the death of his mother. Ms. LaRosa testified credibly and persuasively that Matthew felt a sense of abandonment and was very anxious emotionally' during visits with Mr. Stehlik in New Jersey. Matthew felt anxious and was concerned that he would not be brought back to Pittsburgh. Matthew never had such feelings of abandonment with Mr. Charles.

Reverend Donald B. Paschell credibly testified that he knew the Charles family well. He would stop by randomly to see the Charles family and was impressed with their deep love for one another. He described Mr. Charles as a boy scout: trustworthy, loyal and never lost his temper with anyone. Reverend Paschell credibly testified that Mr. Charles is a very good person.

Carolyn Libert was a very credible witness who testified on behalf of Mr. Charles. She testified credibly as follows: she has known Mr. Charles and his family for six years; she is a school teacher and a Sunday school teacher; she knows Mr. Charles to treat all of his children the same (in fact, she did not know that some of them were his biological children); she knows Mr. Charles to be a very kind, caring and consistent parent.

Lynn Clarke credibly testified on behalf of Mr. Charles. She credibly testified as follows: she is an elementary education teacher' and a superintendent of Sunday school; she has known the Charles family for six years and was in their house approximately two times per week; Randall Charles and Matthew love each other very much; the Charles family was a normal, healthy and functioning family.

Diane Stehlik, Mr. Stehlik's sister-in-law, credibly testified. that Mr. Stehlik has a problem with anger that particularly manifests itself during times of stress or conflict. There is no credible evidence, however, that this anger has ever manifested itself toward Matthew in a physical way, and there is no indication that it is likely to do so.

Mr. Stehlik's mother testified that she is seventy-nine years old and lives about fifty minutes (by car) from her son.

She credibly testified that she would help with child care to the extent that she is able.

Mr. Stehlik is fifty-three years old. He has been employed as an electrician for thirty-four years and currently works in New York City. He starts work at 8:00 a.m. which requires him to leave for work at 6:00 a.m. to drive to the Park n' Ride. His quitting time is 3 :30 p .m.

Mr. Stehlik is currently single. He described his marriage to Matthew's mother as a sad marriage.

There is no question that Mr. Stehlik loves Matthew very much. Mr. Stelilik has taken parenting classes to improve his parenting skills. Al though Mr. Charles genuinely believes that Mr. Stehlik has an alcohol problem, I found Mr. Stehlik's testimony credible that he does not have such a problem.

Mr. Stehlik admitted that during his partial custody visits with Matthew in New Jersey, Matthew would sometimes ask if he could go home (to Pittsburgh) early because he missed his mom, Kim and Kevin and Mr. Charles.

There have been episodes of questionable judgment by Mr. Stehlik. For example, during a recent partial custody visit, he "playfully" locked himself inside and Matthew outside an automobile for a moment. This incident occurred after Matthew had lost his Mother, brother and sister. Matthew certainly did not need to feel that another family member was withdrawing from him. This incident made Matthew feel quite sad. In addition, during the evaluation phase of this trial, Mr. Stehlik exhibited extremely angry conduct toward the drug and alcohol evaluator.

My overall impression of Mr. Stehlik, however, was that he is a good man and truly wants to be a loving (and loved) father. On the witness stand, Mr. Stehlik came across as a fair and patient man. This was supported by the credible testimony. of his neighbors. It is also true, however, that Mr. Stehlik has the capacity to withdraw and isolate himself from others. This is the opposite of what Matthew needs right now. Moreover, Mr. Stehlik is doggedly pursuing custody of Matthew partly out of his love for Matthew, but partly also for personal reasons. Matthew's presence makes Mr. Stehlik's life more meaningful and represents a source of love to him.

After reviewing all the testimony, I determined that it is in Matthew's best interest to remain in Pittsburgh and to have substantial and increasing partial custody with his biological father in New Jersey. Matthew has had such serious and traumatic changes and losses in his life continues to be that a parent has a prima facie right to custody as against a third party. Thus, I have assumed the law to be that even before the proceedings started, the evidentiary scales were tipped hard in Mr. Stehlik's favor. Despite this standard in favor of Mr. Stehlik, the instant case offers compelling and convincing reasons why Mr. Charles should nevertheless retain primary custody of Matthew at the present time.

Mr. Stehlik's second assignment of error is that the court erred in admitting into evidence testimony and exhibits concerning an incident of domestic violence that was remote in time. Although this assignment of error is somewhat vague, presumably Mr. Stehlik is referring to the evidence introduced at trial regarding the violence between Mr. Stehlik and Matthew's Mother giving rise to the New Jersey order of June 2, 1988 and resulting in Mr. Stehlik's participation in the ACT (Abuse Ceases Today) Program. This incident occurred during Mr. Stehlik' s marriage to Mother and was not so remote in time that it should be ignored by this court.

Obviously, the court must satisfy itself that the court ordered custody arrangement is not likely to result in physical harm to the child. Thus, this testimony recently, it would not be healthy for him to suffer the additional loss of his day-to-day home and father and to be required to move to a new home in New Jersey. There is no question that Matthew would feel safer and happier by staying here in Pittsburgh at the present time. In fact, Dr. Fischer is concerned that a move to New Jersey could actually put Matthew in a state of depression.

If I were to decide this case on the basis of what is in the best interest of the biological father, I would award primary custody to him. Mr. Stehlik is somewhat lonely. He longs for the love of his son and genuinely wants to build a stronger relationship with him. However, because my focus is Matthew' s best interest, I have no hesitancy in finding that Matthew should remain in the primary custody of his stepfather. In addition, Matthew's relationship with his biological father should continue and should be expanded. I have allowed for this in my order.

In reaching this decision, I have assumed that Rowles v. Rowles 542 Pa. 443, 668 A.2d 126 (1995), does not carry precedental weight and that the law of Pennsylvania was relevant. Moreover, this court ultimately determined, after considering all of the evidence, that Mr. Stehlik did. not present a danger of physical harm to Matthew. Thus, the receipt of the subject testimony did not prejudice Mr. Stehlik's case.

Mr. Stehlik next argues on appeal that this court erred in permitting counsel for Plaintiff to engage in discovery on the day scheduled as the final day of trial. Because of the general nature of this assignment of error, I do not know what discovery Mr. Stehlik is referring to. If Mr. Stehlik is referring to the updated testimony from Dr. Fischer, that is addressed below.

Mr. Stehlik next argues on appeal that the court erred in denying the defense motion to strike the January, 1997 testimony of William Fischer, Ph.D., the court appointed psychologist. Because Dr. Fischer was the court appointed psychologist, obviously, the court was interested in hearing his testimony. The January, 1997 testimony related to Dr. Fischer's follow-up meetings with Matthew and the parties. These follow-up meetings resulted in only a slight continuance (approximately three weeks) in the final hearing date. Before I made this most serious decision concerning Matthew's life, I wanted to have the most recent information available to me. Certainly, it was not error to consider this testimony.

Mr. Stehlik also argues that I should have excluded Dr. Fischer's follow-up (January 1997) testimony because counsel for Mr. Charles spoke to Dr. Fischer in preparation for the hearing and that said contact constituted an improper ex parte communication. I did not find that any improper communications took place.

Mr. Stehlik' s next assignment of error is that the court erred in permitting the Plaintiff to admit into evidence certain correspondence. This assignment of error is too general to allow the court to make a meaningful response.

Mr. Stehlik's final assignment of error is that the court erred in overruling the objections of defense counsel. This assignment of error is also too general to allow the court to make a meaningful response.

Footnote

[1]Strictly speaking, the trial was longer than five days as the parties submitted substantial testimony by videotape deposition which the court viewed after regular court hours.

U.S. Constitution: Fourteenth Amendment

Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Amendment Text | Annotations

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.